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In the Supreme Court of the United States

OCTOBER TERM, 1984

LESLIE R. BARTH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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8pp

TABLE OF AUTHORITIES

Page

Constitution:

U.S. Const. :

Amend. IV 4

Amend. V 2, 4

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Petitioners challenge the court of appeals' holding that a corporation whose records have been summoned by the IRS may be required either to designate a knowledgeable employee to offer testimony about those records, or, in the event that no current employee can offer such testimony without risk of self-incrimination, to appoint a new agent for that purpose.

1. In early 1982 an IRS special agent was investigating the tax liabilities of petitioner Leslie R. Barth (C.A. App. 17-22). Pursuant to that investigation, the agent issued summonses to five closely-held corporations (also petitioners here) of which Barth was president (Pet. App. 2a). The summonses directed the corporations to appear before the agent, to produce specified corporate records, and to give testimony about those records (C.A. App. 19-20). When the corporations failed to comply, the government instituted this enforcement action.

The corporations eventually acknowledged that the summonses had been properly issued (Pet. App. 3a), and Barth, in his capacity as corporate president, produced many (but not all) of the summoned documents while the enforcement proceeding was pending (*id.* at 2a). Barth refused, however, on self-incrimination grounds, to testify on the corporations' behalf about what corporate books were kept, or about who was responsible for keeping them (*id.* at 5a). At the government's request, Barth's attorney provided a list of seven other corporate employees "who may have had custody or some knowledge of the [summoned] corporate records" (*id.* at 32a). Six of those employees appeared by counsel, who filed an affidavit stating that he had interviewed the employees and that each of them would assert the Fifth Amendment privilege if called to testify (Pet. App. 6a, 31a-32a). The affidavit did not state that the employees' fears of self-incrimination were reasonable, nor did it supply any facts to show that their Fifth Amendment claims would be valid (Pet. App. 6a). On the basis of this affidavit, the corporations contended that it was impossible for them to comply with the summonses insofar as the summonses requested testimony (*id.* at 19a).

The district court rejected this argument and ordered the summonses enforced (Pet. App. 19a-23a). It determined that the corporations had failed to make "a sufficient showing" that no existing employee could provide the summoned testimony without risk of self-incrimination (*id.* at 32a). And the court determined in the alternative that, in the event no current employees were able to testify about the records, the corporations could appoint for the purpose of providing the summoned testimony someone who had no previous connection with the corporations and who might thus testify free of Fifth Amendment problems (Pet. App. 22a). The corporations were accordingly ordered to "designate, and if necessary, * * * appoint, an agent or agents who

shall, having made such inquiry as is necessary in the circumstances, appear in person * * * to testify for the corporations in response to the summonses, without invoking their personal privileges against self-incrimination" (*id.* at 22a).[1]

The court of appeals, after granting a stay (Pet. App. 37a), affirmed the enforcement order against the corporations (*id.* at 5a-9a). First, the court rejected the corporations' argument that the district court had improperly ordered them "to force a current employee to give up a valid claim of the [F]ifth [A]mendment privilege" (*id.* at 6a). This argument, the court noted, rested on the false assumption that the district court had found the affidavit filed by the employees' counsel to be "sufficient to support their assertion of the [F]ifth [A]mendment privilege" (*id.* at 6a-7a). To the contrary, the court of appeals observed, the district court had "elected to defer to a later time a determination of whether there are any knowledgeable employees who will testify" without asserting the privilege (*id.* at 9a). Under the enforcement order, as the court of appeals read it, "[w]hether the privilege is asserted [is] still left to the employee and whether it will be upheld [is] left for future determination by the [district] court" (*id.* at 8a).

The court of appeals also approved (Pet. App. 7a-9a) the district court's alternative direction that the corporations, if need be, should appoint a new agent to testify on their behalf about the summoned documents. The corporations' basic obligation, the court noted, was "to make every

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[1]The district court also ordered the summonses enforced insofar as they directed Barth in his individual capacity either to produce file copies of certain corporate tax returns of which he was allegedly the custodian, or to "testify under oath * * * that he did not possess them on the date of the summons" (Pet. App. 19a). The court of appeals reversed the enforcement order in this latter respect (*id.* at 4a-5a, 9a), and that aspect of the case is not involved here.

reasonable effort to obey the summonses," and, should all of their current employees successfully assert their personal Fifth Amendment privileges, the appointment of a new agent free of self-incrimination problems would be "the only way in which the corporations might satisfy their obligation to testify" (Pet. App. 7a). Since a corporation can act only through its agents, the court concluded, any other holding would violate the well-established rule that "a corporation itself possesses no [F]ifth [A]mendment privilege" (*ibid.*).

2. Petitioners present as their first question for review (Pet. i) whether corporations "can * * * be compelled to coerce their employees to forego personal Fifth Amendment rights." This question, however, is not presented by this case, at least not in its current posture. As the court of appeals emphasized (Pet. App. 7a-9a), it has not yet been determined whether petitioners' employees will in fact assert their Fifth Amendment rights, or whether, if asserted, those claims will be valid. The district court's order, as the court of appeals noted, "does not seek to have Barth or the corporations waive any personal privileges of * * * existing employees" (Pet. App. 8a). Rather, "[w]hether the privilege is asserted is still left to the employee and whether it will be upheld is left for future determination by the [district] court" (*ibid.*).

Petitioners also contend that they cannot, consistently with the Fourth and Fifth Amendments, be "compelled to hire a new employee for the purpose of * * * giving testimony to the I.R.S." (Pet. i, 6-10). Whatever the merits of petitioners' contention, it is not now ripe for review by this

Court.[2] Petitioners would be required to hire a new employee to testify about the records only in the event that all of their current employees assert, and assert successfully, their personal privileges against self-incrimination. Since it is not yet known whether they will do so, the question petitioners seek to present is at this point entirely hypothetical.[3] If all of petitioners' existing employees do assert their privileges successfully, and if petitioners thereafter are held in contempt for refusing to appoint a new agent capable of testifying without fear of self-incrimination, and if those contempt citations are affirmed on appeal, petitioners will be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review of the court of appeals' decision would be premature at this time.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1985

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[2]It is now nearly three years since the summonses were issued, and almost two and a half years since the government petitioned for enforcement of the summonses (Pet. App. 2a). Further review at this time would cause serious additional delay in the investigation of petitioners' tax liabilities.

[3]Because the question is hypothetical, we are not responding to petitioners' contentions on the merits. We will do so if the Court requests.